



Comptroller General
of the United States

Washington, D.C. 20548

McArthur 1-26-91

Decision

Matter of: Virginia Panel Corporation

File: B-247825

Date: June 12, 1992

Sandra S. Stowers for the protester.
Dennis A. Walker, Esq., Department of the Air Force, for the agency.
John E. Craycroft for MAC Panel Company, an interested party.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider the protester's contention that production of an acceptable part will necessitate infringement of its patent, since patent holders have adequate and effective remedies for such infringement, which function to save the government from having its procurements delayed pending litigation of such disputes.

2. Where protester presents no evidence in support of its position that awardee's part was technically unacceptable, protest against agency's evaluation is denied.

DECISION

Virginia Panel Corporation protests the award of a contract to MAC Panel Company under request for proposals (RFP) No. F09650-91-R-0199, issued by the Department of the Air Force for interface test adapter (ITA) assemblies. The protester principally contends that the awardee did not offer a part equivalent to its own part, which was specified.

We deny the protest.

On October 15, 1991, the agency issued the solicitation for a firm, fixed-price contract to fabricate and supply an ITA assembly for automatic test equipment to support the F-111 avionics modernization program test set development project.

The assembly provides a resistance- and noise-free interface between an F-111 avionics intermediate station and the unit under test.

The RFP schedule called for an assembly "with blank modules, Du[a]ll tier receivers. Features six handles on the cover, Virginia Panel Corp.; P/N 410102212."¹ There was no listing of any additional required features or processes for production of the assembly. The solicitation provided for award on the basis of price.

The agency received two proposals on November 15, from the protester and from the eventual awardee. Technical evaluators advised the contracting officer that the sample submitted by MAC Panel did not meet certain characteristics of the protester's part, not listed in the solicitation but considered essential by the agency. The agency brought this to the attention of MAC Panel, which promised to provide the additional features required.

On January 31, 1992, the agency asked each offeror to submit a best and final offer (BAFO). Both offerors responded on February 3, with MAC Panel submitting a substantially lower price. Accordingly, on February 13, the agency made award to MAC Panel as the low, acceptable offeror, and this protest followed.

In arguing that the agency unreasonably determined the MAC Panel proposal to be technically acceptable, the protester contends that either MAC Panel is infringing the protester's patent on that part or, to the extent the awardee offers a substitute design, the agency unreasonably determined the MAC Panel part to be acceptable because any design other than the protester's will cause premature failure and damage to the receiver and ITA mechanism. The protester contends that its own specifications for the assembly contain rigid requirements for meeting military standards that insure the quality of the part.

¹In its initial protest, Virginia Panel, also asserted that the awardee's part was not "equivalent" but "was approved for [this] procurement without notice" to Virginia Panel. Although the solicitation on its face contained a noncompetitive brand name only purchase description, the agency states that the protester was on notice of the competitive nature of the procurement and, specifically, of its competitor, MAC Panel. In its comments on the report, the protester failed to respond to the agency's statement. We therefore deem the matter abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

First, our Office will not consider the protester's contention that production of an acceptable part will necessitate infringement of its patent, since patent holders have adequate and effective remedies for such infringement, which function to save the government from having its procurements delayed pending litigation of such disputes. See Hollingsead Int'l, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372; Fairchild Weston Sys., Inc., B-229568.2, Apr. 22, 1988, 88-1 CPD ¶ 394; 28 U.S.C. § 1498 (1988). Second, the contracting agency is responsible for evaluating the data submitted by an offeror and determining whether the data demonstrate the acceptability of the offeror's product; the agency enjoys a degree of discretion in making such determinations, which we will not disturb so long as they are reasonable. See VG Instruments, Inc., B-241484, Feb. 7, 1991, 91-1 CPD ¶ 137. Although the protester asserts that only its product can meet the agency's needs, it has presented no evidence that would support challenging the agency's determination that the awardee's proposal was acceptable; therefore, based on the record before us, we cannot find that determination to be unreasonable. See Sheffield Schaudt Grinding Sys., Inc., B-246699, Mar. 27, 1992, 92-1 CPD ¶ 313.


The protester also argues that the agency should have notified the protester of the award at the same time that it notified the awardee; this would have allowed Virginia Panel to file its protest in time to obtain a stay of contract performance pending the protest.³ Federal Acquisition Regulation (FAR) § 15.1001 (FAC 90-7) requires prompt notice of award to unsuccessful offerors; in this instance, the

²In its comments, the protester for the first time also alleges that the agency failed to conduct meaningful discussions by failing to alert Virginia Panel that its price was too high. The protester identifies no new facts in the agency report that gave rise to this grounds of protest, and its arguments in this regard do no more than restate those in the original protest, to the effect that the awardee is not meeting the same quality standards that the protester has established for production of the part. We therefore find this protest ground is untimely since it should have been raised within 10 days after Virginia Panel was advised of the awarded price on February 18, 1992. See 4 C.F.R. § 21.2(a)(2) (1992).

³Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553 (1988), agencies need only suspend performance where the agency is notified of a protest to our Office within 10 calendar days of award.

agency made award on February 12 and sent notice by letter dated February 18, 3 working days later. We do not find this delay unreasonable.

We deny the protest.


for James F. Hinchman
General Counsel